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QUESTION PRESENTED FOR REVIEW

Whether Congress included district judges within Section 2(b) of the Voting Rights Act when it extended Section 2 to add a results test for vote dilution?

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MISCELLANEOUS

Nos. 90-813 and 90-974

In the Supreme Court of the United States

OCTOBER TERM, 1990

HOUSTON LAWYERS' ASS'N, *et al.*, and
LEAGUE OF UNITED LATIN AMERICAN CITIZENS, *et al.*,
PETITIONERS,

v.

THE ATTORNEY GENERAL OF TEXAS and
JUDGE F. HAROLD ENTZ, *et al.*,
RESPONDENTS.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR RESPONDENT
JUDGE F. HAROLD ENTZ

STATUTE INVOLVED

Section 2 of the Voting Rights Act, as amended, provides as follows:

> (a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantee set forth in section 1973b(f)(2) of this title, as provided in subsection (b) of this section.

> (b) A violation of subsection (a) of this section is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) of this section in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: *Provided*, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

42 U.S.C. § 1973 (1988) (emphasis in original).

STATEMENT OF FACTS

Respondent Judge Entz is a sitting criminal district judge in Dallas County, Texas. He intervened as a defendant partly to present an independent factual defense of Dallas County.[1] Although this case was resolved below on legal issues largely independent of the facts, Petitioners have presented such a misleading view of the facts as they pertain to Dallas that Judge Entz must respond.

Dallas County is a large metropolitan area encompassing the seventh largest city in the U.S. (Dallas), and several medium-sized cities (Garland, Irving, Mesquite,

[1]Judge Entz also presented legal arguments not raised by the Attorney General, including the plain meaning and constitutional arguments briefed here.

Richardson and others). (DI-Dallas Ex. 2)[2] Dallas County has a sophisticated system of judicial administration to handle the problems that arise in a major metropolitan county. (Tr. 4:144) Its thirty-seven district courts are divided into four specialized groups with principal responsibility for criminal, civil, family, and juvenile matters. (DI-Dallas Ex. 22) Although each court operates as an autonomous judicial entity, central administration of case docketing and jury selection from venire persons within the county provides for the quick and efficient administration of justice in Dallas County. (*See* Summary of Deposition of Hon. John McClellan Marshall, DI-Dallas Ex. 24)

District judges in Dallas County run for and are elected to the bench of a particular, specialized district court. (Tr. 5:81) Each court hears its own docket and decides its own cases; there is no collegial decisionmaking by any collective body of district judges. (*Id.*) Thus, each court is effectively a single-person elected position. In accordance with the long tradition in the State of Texas of the county being the fundamental unit of state government at the local level, each judge is elected county-wide and has primary jurisdiction county-wide. (Tr. 4:138) This decades-old system ensures that no particular single interest group in a diverse county can exercise undue influence over any particular judge, that all judges will have a county-wide perspective to match their county-wide jurisdiction, and that all voters in the county can

[2]All of Judge Entz's exhibits (noted "DI-Dallas Ex. x") were offered and admitted as a group. Tr. 4:72-74.

participate in the election of all judges with primary jurisdiction over the county.

Until recently, Dallas County was a one-party Democratic county. (Tr. 4:98) Beginning in about 1978, however, Dallas County government underwent a Republican revolution. The Dallas County bench in a short ten years transformed from completely Democratic to almost completely Republican. (Tr. 4:99; DI-Dallas Exs. 4A-8A) The simple fact in Dallas County judicial politics today is that only an anomalous Democratic candidate can be elected as a district judge.[3] Conversely, candidates who run as Republicans *will* get elected.[4]

This overwhelming trend to Republican judges is completely color-blind. Black Republican candidates have defeated white Democratic incumbents, and white Republican challengers have defeated highly qualified black Democratic incumbents who had virtually every conceivable endorsement.[5]

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[3]The *only* elected Democratic district judge in Dallas County is named Ron Chapman. Another Ron Chapman (of the Dallas based radio station KVIL) is the host of the top-ranked morning radio show in the Dallas area. (Tr. 4:101)

[4]This situation is true without regard to race, recommendation of the local Committee for a Qualified Judiciary, results of the local Bar poll, money spent in campaigning, and/or incumbency. All of the evidence from both sides is consistent on this point.

[5]For example, Jesse Oliver, a black Democrat, was a former state representative from a predominantly minority area of Dallas. He was appointed to the district bench following a relatively high-visibility state senate campaign. In running for reelection he received the endorsements of virtually all groups that offer endorsements -- both major Dallas newspapers, the Committee for a Qualified Judiciary (a non-partisan group), the local bar poll, and numerous civic groups. Although these endorsements contributed to his being one of the highest polling *(continued on next page)*

Of the nine contested primary and general district judge elections with a black candidate, the black Republican candidates won all four of the races in which they campaigned and the black Democratic candidates lost all five of the races in which they campaigned. (Tr. 4:106, DI-Dallas Ex. 9A) Dallas County voters are generally unaware of the name, office, or racial background of judicial candidates.[6]

Black Democratic judicial candidates fare equally as well as white Democratic judicial candidates, and typically do better than the top of the Democratic ticket (DI-Dallas Ex. 9A); one black Republican judicial candidate, Judge Carolyn Wright, led the ticket of all Republican candidates in Dallas County. (Tr. 4:213) Even Petitioners' expert Richard Engstrom candidly admitted that the evidence established that party affiliation rather than race is the best indicator of both the election results and which candidate would receive the support of the minority community. (Tr. 2:147-49) *Expert witnesses for both sides of the case and most of the losing black Democratic judicial candidates agreed that the losing black Democratic judicial candidates would have won had they run as*

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Democratic candidates in Dallas County, he still lost in the Bush-led Republican sweep of Dallas County. (Tr. 2:244; 2:247-52)

[6]*See* DI-Dallas Ex. 11. This exhibit is a survey of voter awareness of Dallas County judges. The survey indicated that the vast majority of voters of all races were wholly unaware of the identity of Dallas County judges, much less the race of those judges. Amazingly, even when told that persons named in the survey were elected public officials, most respondents identified Ron Chapman as a radio disk jockey. Charts summarizing the survey data are found at DI-Dallas Exs. 12-14. *See also* Tr. 4:104-23 (testimony of Dr. Champagne regarding survey).

Republicans — as they were all invited to do. (Tr. 2:188; 5:283-84) Black judicial candidates of both parties are faring neither better nor worse because of their race. Judicial candidates in Dallas County win or lose due to their partisan affiliation, not their race.[7]

The District Court ignored the political and practical reality and based its conclusions on the reality-blinding excursion of bivariate ecological regression analysis.[8] (November Order at 14-78) According to the 1980 Census, Dallas County was approximately 65% white, 19.7% black, and 15.3% Hispanic. (Tr. 4:130) In August, 1989, the Dallas County district bench was 91.7% white, 5.6% black, and 2.8% Hispanic. (Tr. 4:130; DI-Dallas Ex. 18A) Petitioners claimed that "underrepresentation" alone showed a violation of section 2, and used their statistical analyses to support their claims.

But the undisputed facts showed that, nationwide, the racial composition of a district bench will match the racial composition of the bar from which judicial candidates are

[7]It certainly also is true that black and white voters tend to show different voting patterns. Black Dallas County voters in judicial races tend to vote over 95% for the Democratic candidate, with a phenomenal 93% casting straight ticket votes. (Tr. 5:280) White voters tend to vote 60-70% for the Republican candidate, with a much smaller 28% straight ticket Republican vote. (Tr. 5:281; DI-Dallas Ex. 16) The amazingly high level of straight ticket voting by black voters, coupled with the relative lack of awareness or knowledge of judicial candidates, shows that even in the black community, judicial candidates get black votes not because of their race or qualification, but because of their partisan affiliation.

[8]"Bivariate ecological regression analysis" is a statistical technique that attempts to estimate voting patterns of racial groups. *See Thornburg v. Gingles*, 478 U.S. 30, 52-53 (1986).

drawn, rather than the population as a whole, *regardless of what system of judicial selection was used.*[9] The evidence showed that 2.2% of the lawyers in Dallas County are black. (Tr. 4:130) Dr. Champagne[10] testified accordingly that the Dallas County judicial bench (or Texas or New York benches) would have a racial composition that paralleled the number of minorities in the pool of legally qualified candidates. The number of minority law students is increasing; as those students graduate, pass the bar, and gain experience, the percentage of minority judges inevitably will increase. (Tr. 4:136-38) The judicial election *system* that the District Court condemned had nothing to do with the percentage of minorities on the bench.

The Petitioners' case rested primarily upon the statistical type of proof discussed above; conspicuously lacking from their case was any contention or testimony that the relief sought — single member districts — would have a positive impact on the role of minorities in connection with the judicial

[9]This was based on a comprehensive study of all likely factors involved in judicial selection, including the method of selection. The study showed that nationwide by far the highest correlation and the best explanatory factor for the number of minority judges in a jurisdiction is the number of minority lawyers. (Tr. 4:130-32) That correlation holds true in Dallas County, as well as the rest of the country.

[10]Dr. Anthony Champagne is a professor of political science at the University of Texas at Dallas, specializing in judicial selection; he is currently serving as a United States Supreme Court Judicial Fellow. He has published widely in the field. *See, e.g.*, Champagne, *The Selection and Retention of Judges in Texas*, 40 SW. L.J. 66 (1986); Champagne, *Judicial Reform in Texas*, JUDICATURE, Oct.-Nov. 1988, at 146; *see generally* DI-Dallas Ex. 3 (Champagne vita). Dr. Champagne testified as an expert witness for Judge Entz.

system other than permitting the election of some greater number of minority judges. The most probative testimony on this point came from Judge Wright of Dallas County and Judge Sturns of Tarrant County. Both of these black Republican judges believed that single member districts would be bad for minorities in the long term. They would lead to "black" seats on the bench, with public perceptions of "black" justice and "white" justice depending on the judicial district. (Tr. 4:192-93; 5:71-72) Black jurists, as a practical matter, would be limited to their quota of seats based on the number of majority-minority districts and would be unable to run from other districts. (*Id.*) The net result over time of single member districts would be a hardening of racial attitudes, rather than a color-blind system of justice. (*Id.*) That surely is not a goal to be pursued at the expense of a system that even the District Court acknowledged "has, for the most part, served us well for many years." (November Order at 6)

SUMMARY OF ARGUMENT

Section 2(b) of the Voting Rights Act was added in 1982 in the course of amendments designed to reverse this Court's ruling in *City of Mobile v. Bolden*, 446 U.S. 55 (1980). The amendments were designed to change the proof standard from "intent" to "results," and also to add protection against vote dilution to a statute that previously protected only access to the ballot. Petitioners characterize the issue before this Court as whether an amendment that was intended only to change the standard of proof should also be read to have accidentally excluded judges from the coverage of section 2.

This position makes sense only if one ignores the second goal of the 1982 amendments, to create a new dilution remedy.

With this second goal in mind, the question before the Court, properly understood, is: When Congress added new substantive scope to section 2 with the 1982 amendments, did they include judges within that new federal remedy? The straightforward way to answer that question is to look at the text of the new statute. The dilution remedy extends only to "representatives." Judges are not "representatives." Once section 2(b)'s purpose is understood, much of Petitioners' search for legislative history dealing with "intent to create an exception to the scope of the access protection of old section 2" becomes pointless. Section 2(b) is simply different from the old section 2.

Alternatively, if judge are somehow representatives, Petitioners are still not entitled to relief because district judges in Texas are single office holders, like a governor, rather than members of multi-member bodies such as legislators. District judges do not deliberate collegially, like legislators. Thus, the underlying representative theories that permit replacing at-large legislators with single member district legislators simply do not apply in the context of a solo decisionmaker, such as a district judge.

Finally, the Court should adopt one of the two preceding theories because if the Court determines that district judges are representatives — and representatives who, like legislators, can be reapportioned without altering the fundamental nature of their office — then the Court must address serious constitutional concerns over the validity of

section 2, as applied. First, the creation of a constitutionally valid judicial system, one that comports with the numerous due process and criminal procedure constitutional requirements, would require a federal intrusion into core state sovereign activities to an extent that would violate principles of federalism and the guaranty clause. Doing this on the belief that judges are representatives and should be treated like political representatives offends notions of separation of powers. Finally, if these more specific attacks should fail, the Court must confront the question whether section 2 was constitutionally adopted in the first place.

This Court tries, when possible, to avoid consideration of constitutional issues. Here, especially when there is a viable and compelling alternative, the Court can resolve this case simply by reading the statute. Section 2(b) applies to representatives; judges are not representatives.

ARGUMENT

I. DISTRICT JUDGES ARE NOT REPRESENTATIVES AND THEREFORE WERE NOT INCLUDED WITHIN THE SCOPE OF THE EXTENSION OF SECTION 2

A. The 1982 Amendments to Section 2 Added Both a Results Test and a Dilution Remedy

It is widely understood that the 1982 amendments to section 2 were a congressional response to this Court's opinions in *City of Mobile v. Bolden*, 446 U.S. 55 (1980). This is often stated in terms of a congressional attempt to replace an intent standard with a results standard in section 2.

What Petitioners completely ignore — and what is crucial for this case — is that Congress also supplemented section 2 to protect against dilution of voting rights, as well as against impairing access to the ballot.

By ignoring the second aspect of the amendment, Petitioners are able to mischaracterize the thrust of the 1982 amendments as simply altering the proof standard and thereby equating the substantive reach of the pre- and post-amendment section 2. Petitioners thus improperly transform the question before the Court to whether the 1982 amendments inadvertently excluded judges from the unquestioned coverage of the pre-amendment section 2. In fact, when the dual nature of the 1982 amendments is considered, the issue is whether the addition of new substantive coverage reached far enough to include judges. Because Petitioners' fundamentally erroneous perspective permeates their argument, Judge Entz addresses it even before considering whether judges are included in the plain meaning of "representative."

City of Mobile involved attacks under section 2, the Fifteenth Amendment, and the Fourteenth Amendment. *Id.* at 58. This Court's distinct treatment of each attack holds the key to understanding the 1982 amendments to section 2. The plurality initially ruled that section 2 was coterminous with the Fifteenth Amendment. *Id.* at 60-61 (Part II). It then addressed the Fifteenth Amendment claims and held first, that a Fifteenth Amendment claim requires a showing of discriminatory intent, *id.* at 61-63, and second, that there was no showing of any abridgment of the right to access to the ballot and therefore no Fifteenth Amendment violation: "Having found that Negroes

in Mobile 'register and vote without hindrance,' the District Court and the Court of Appeals were in error in believing that the appellants invaded the protection of that Amendment in the present case." *Id.* at 65. Thus, plaintiffs lost under the Fifteenth Amendment not because of the heightened standard of intent, but because they did not show any impairment of their rights to access to the ballot.[11] The plurality then

[11]This view of the Fifteenth Amendment as protecting only access to the ballot is consistent with this Court's longstanding view of that Amendment's reach. Beginning in companion cases *Guinn v. United States*, 238 U.S. 347 (1915), and *Myers v. Anderson*, 238 U.S. 368 (1915), the Court outlawed the application of "grandfather clauses" that exempted from literacy tests those persons either entitled to vote prior to the passage of the Fifteenth Amendment or those who were lineal descendants of persons entitled to vote prior to such time. In both cases, passage of the literacy tests were a precondition to voting. Thus, the grandfather clauses were prohibited by the Fifteenth Amendment because they operated in conjunction with the literacy test to deny black citizens access to the polls.

Likewise, onerous procedural requirements that effectively handicapped the black franchise are prohibited by the Fifteenth Amendment. In *Lane v. Wilson*, 307 U.S. 268 (1939), the Court struck down an Oklahoma law that perpetually disenfranchised all those citizens who failed to register to vote in a short eleven day period in 1916. The exception for failure to register was for those who had voted in 1914. Of course, blacks had not voted in 1914 because they were barred from the polls by the discriminatory application of literacy tests.

In *Smith v. Allwright*, 321 U.S. 649 (1944), and *Terry v. Adams*, 345 U.S. 461 (1953), the Court outlawed all-white primaries, pursuant to which blacks were prevented from voting in the controlling parties' primary, but were allowed to vote in the general election in which the victor of the all-white primary ran unopposed. In *Gomillion v. Lightfoot*, 364 U.S. 339 (1960), the Court struck down a racial gerrymander that fenced the black residential area out of the city limits, rendering them ineligible to vote in city elections. Finally, in *South Carolina v. Katzenbach*, 383 U.S. 301 (1966), the Court upheld the literacy test ban, as well as other provisions of the Voting Rights Act that attempted to protect the physical casting of ballots, as an appropriate

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considered plaintiffs' dilution attack on the at-large system, but only in its discussion of equal protection under the Fourteenth Amendment. *Id.* at 65-80 (Part IV).[12]

Thus, the ruling in *City of Mobile* that section 2 was coterminous with the Fifteenth Amendment affected section 2 in two ways: (1) it restricted section 2 to intentional discrimination, and (2) it restricted section 2 to impaired access to the ballot claims under the Fifteenth Amendment, and excluded coverage for dilution claims under the Fourteenth Amendment. Congress was well aware of this second restriction on section 2 when considering the 1982 amendments and intended to alter that limitation, as well as adopt a results test:

> Likewise, although the plurality [in *City of Mobile*] suggested that the Fifteenth Amendment may be limited to the right to cast a ballot and may not extend to claims of voting dilution (without explaining how, in that case, one's vote could be "abridged"), this section without question is aimed at discrimination which takes

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exercise of congressional authority to protect minority access to the polls under the Fifteenth Amendment.

[12]Again, the plurality's view that qualitative vote dilution is prohibited by the Equal Protection Clause of the Fourteenth Amendment, not by the Fifteenth Amendment, is consistent with this Court's well-established reading of the Fourteenth Amendment. *See, e.g., Fortson v. Dorsey*, 379 U.S. 433, 439 (1965); *Reynolds v. Sims*, 377 U.S. 533, 566 (1964). Guaranteed access is a Fifteenth Amendment protection; meaningful access springs from the Fourteenth Amendment. Hence, the Supreme Court's analysis of claims that multi-member districts were being used invidiously to cancel out or minimize the voting strength of racial groups always has been an equal protection analysis. *White v. Regester*, 412 U.S. 755, 764 (1973); *Whitcomb v. Chavis*, 403 U.S. 124, 142-44 (1971); *Fortson v. Dorsey*, *supra*, at 439.

> the form of dilution, as well as outright denial of the right to register or to vote.

S. REP. No. 97-417, 97th Cong., 2d Sess. 30 n.120 (1982), *reprinted in* 1982 U.S. CODE CONG. & ADMIN. NEWS 177, 208 n.120. *See also id.* at 25 (acknowledging plurality's reading of Fifteenth Amendment as excluding dilution claims). Congress thus based the 1982 amendments on both the Fourteenth and Fifteenth Amendments. *See id.* at 18, 27, 39.

Congress plainly drafted the 1982 amendments to section 2 to accomplish both of its remedial goals in light of *City of Mobile*. In what is now subsection (a), Congress added "results" language. Congress also added subsection (b), which created a dilution remedy in section 2. The question raised by this case, then, is whether Congress included judges within the scope of the dilution remedy it added in the 1982 amendments to section 2.

B. Judges Are Not Included in the Plain Language of Section 2(b)

In his majority opinion in *LULAC v. Clements*, 914 F.2d 620 (5th Cir. 1990) (*en banc*), Judge Gee analyzed the meaning of Section 2(b) of the Voting Rights Act using the plain language of the section. Judge Entz will not attempt to improve on Judge Gee's lucid demonstration that the plain meaning of "representative" does not include judges. In concluding that Congress could not have intended to include judges within the definition of "representatives," Judge Gee wrote that "[g]iven the mutual exclusiveness of the two terms, to suggest that Congress chose 'representatives' with the intent of including judges is roughly on a par with suggesting that the

term *night* may, in a given circumstance, properly be read to include *day*." *Id.* at 628-29 (emphasis in original).[13] Ask people on the street; they will, to a person, say "judge" is different than "representative."[14]

Holding that judges are not representatives still provides ample protection for minority voting rights in judicial elections. First, any act that is intentionally dilutive is directly actionable under the Fourteenth Amendment. Second, any action that results in minorities having diminished access to the ballot in judicial elections is actionable under section 2(a). Thus, a plain reading of the statute provides a workable result, without resorting to the quagmire of legislative history.

Resorting to legislative history to find a gloss for the plain import of a statute can be unreliable, since it can be manipulated by any legislator who takes the time to express his or her views on the record as to what the statute means. Such statements are not ratified by Congress when it passes the bill, and, in reality, are rarely known by people who vote for the bill. "[I]t must be assumed that what the Members of the House and Senators thought they were voting for, and what

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[13]Holding that judges are elected representatives, like legislators, also would make a mockery of notions of separation of powers.

[14]The dictionary defines "representative" as: "one that represents another or others in a special capacity. . . one that represents a constituency as a member of a legislative or other governing body." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1926 (1976). The word has no peculiar legal definition: "A person chosen by the people to represent their several interests in a legislative body; *e.g.* representatives elected to serve in Congress from a state congressional district." BLACK'S LAW DICTIONARY 1302 (6th ed. 1990).

the President thought he was approving when he signed the bill, was what the text plainly said, rather than what a few Representatives, or even a Committee Report, said it said." *United States v. Taylor*, 487 U.S. 326, 108 S. Ct. 2413, 2424 (1988) (Scalia, J., concurring in part). Therefore, the legislative history is not to be considered by a court at all unless the language of the statute is so ambiguous the court is at a loss to make sense of it. The judiciary is to "interpret laws rather than reconstruct legislators' intentions. Where the language of those laws is clear, we are not free to replace it with unenacted legislative intent." *INS v. Cardoza-Fonseca*, 480 U.S. 421, 452-53, (1987) (Scalia, J., concurring).

Although in years past the Supreme Court may have appeared to deviate from this doctrine at times, this Court's more recent decisions have reaffirmed this standard. In *United States v. Monsanto*, 109 S. Ct. 2657 (1989), one party sought to persuade the Court through the use of legislative history. The Court responded: "In determining the scope of a statute we must look first to its language." *Id.* at 2662. The Court then rejected the tender of postenactment legislators' statements explaining congressional intent behind the statute, and stated: "As we have noted before, such postenactment views 'form a hazardous basis for inferring the intent' behind a statute; instead Congress' intent is best determined by looking to the statutory language it chooses." *Id.* at 2663 (citations omitted).

Judge Higginbotham, in his concurrence below, reached into the legislative history only after he determined that an ambiguity arose because he thought elected judges were "representatives" to the extent that electoral accountability

inherently implies some degree of representation. *LULAC*, 914 F.2d at 636. Equating accountability with representation, however, is a mistake.

Accountability deals with who hires and fires; representation deals with the function of the position, whether one person speaks and acts for another. In many instances the two concepts overlap. For example, a Member of Congress is accountable to his or her constituents and also represents those constituents. The coincidence of these two concepts, however, is not automatic. For example, prior to the Seventeenth Amendment, senators were selected by state legislators; the senators so selected nonetheless did not "represent" the state legislators, but rather the people of the state. The honorable Justices of this Court are appointed by the President and can be removed by the Senate; no one would contend, however, that the Justices "represent" either the President or the Senate.[15]

In short, Judge Higginbotham erred. The fact that Texas' judges are elected in no sense creates an ambiguity regarding whether they are in some sense "representatives" of Texas voters. Absent that ambiguity, there is no basis for exploring the legislative history of section 2, either from 1965 or from 1982. "Representative" is a simple word with a

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[15]Conversely, one can represent without being elected. "In its original conception, representation did not always require voting, as can be shown in the Declaration of Independence. The body of this document consists of a long bill of particulars against George III which would be unnecessary and misleading if representation required voting." Mansfield, *Impartial Representation*, in REPRESENTATION AND MISREPRESENTATION 106 (R. Goldwin ed. 1968).

meaning plain enough to require no further inquiry. The Court need go no further than the face of the statute.

C. Neither Rules of Construction Nor Legislative Intent Can Transform Judges into Representatives

As discussed above, there is no need for this Court to turn to evidence of legislative intent or apply canons of statutory construction because the text of the statute itself is clear.[16] Faced with the awkward fact of the statutory language, Petitioners and *amicus* the United States prefer to discuss legislative history and canons of construction. One fact apparent from the legislative history is that Congress simply did not give much consideration to the prospect that

[16]If the Court is inclined to apply canons of construction, Judge Entz commends the one used below by Judge Gee:

> In 1982, as of the time of Congress's adoption of the Court's language from *White*, at least fifteen published opinions by federal courts . . . had held or observed that the judicial office is not a representative one, most often in the context of deciding whether the one-man, one-vote rubric applied to judicial elections. Not one held to the contrary. . .
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> . . .
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> . . . By the settled canon of construction, we must presume that Congress was aware of the uniform construction which had been placed by the courts on the term that it selected, a construction by which the judicial office was not deemed a "representative" one.

LULAC, 914 F.2d at 626, 628 (citations and footnote omitted). *See also Wells v. Edwards*, 347 F. Supp. 453, 455 (M.D. La. 1972), *aff'd*, 409 U.S. 1095 (1973) ("Judges do not represent people, they serve people."); *Hatten v. Rains*, 854 F.2d 687, 696 (5th Cir. 1988) ("Judges, even if elected, do not serve a primarily representative function.").

litigants might some day claim that judges are "representatives" subject to section 2(b). Thus, the legislative history debate turns into a procedural question: Who must "prove" Congress' intent regarding coverage of judges?

Petitioners attempt to shift the burden and require Respondents to show that Congress intended to exclude judges. Normally a party seeking relief under a statute has the burden of showing that the statute applies. Even more to the point, as discussed above, section 2(b) was an extension of section 2 to add a dilution test. Given that context, *Petitioners* should bear the burden of showing that when Congress extended section 2 to add a dilution test, Congress intended the extension to reach judges.

In a related form of that argument, Petitioners urge a syllogism on the Court: (1) amended section 2 covers everything old section 2 covered; (2) old section 2 covered judges; therefore (3) new section 2 covers judges.[17] The syllogism is defective because the major premise is wrong. Section 2(b) facially has diminished scope from the old section 2.

The old section 2 (and the current section 2(a)) cover all voting; section 2(b) covers only voting related to electing people. For example, old section 2 and current section 2(a) would cover a referendum or a vote on a state constitutional amendment, while section 2(b) facially does not cover those. Thus, even prior to addressing the question whether judges are

[17]This argument proceeds wholly independently from the statutory language, which seems an unusual method of statutory construction.

"representatives" we know that the syllogism fails — we know the scope of section 2(b) is different than the scope of old section 2 and simply must determine how *much* different.[18]

Finally, in an attempt to gain from the legislative silence on the subject, the United States urges this Court to draw a negative inference from the fact that Congress did not explicitly say much about judges. Brief for the United States at 32 & n.28, *Chisom v. Roemer*, Nos. 90-757 and 90-1032. Hinting that detective skills are needed to ascertain Congress' intent, the United States relies upon the principle of "the dog that did not bark," citing A. DOYLE, *Silver Blaze*, in THE COMPLETE SHERLOCK HOLMES (1927).[19] The United States should have consulted a different Holmes: "You must not alter words in the

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[18]Viewed in this framework, Petitioners' reliance on the broad definition of voting in section 14(c)(1) is even less pertinent, particularly given the fact that section 2(b) does not use the term. Also, by their logic, a provision that referred to "voting for dogcatcher" would apply to judges because of the broad definition of "voting." Likewise their reliance on the scope of section 5 is pointless. The issue is not the scope of old section 2, of new section 2(a), of section 5, or of section 14(c)(1). The issue is, simply, whether judges are "representatives" under section 2(b).

[19]The majority opinion in the very case the United States cites specifically rejected drawing that negative inference:

> [I]t would be a strange canon of statutory construction that would require Congress to state in committee reports or elsewhere in its deliberations that which is obvious on the face of a statute. In ascertaining the meaning of a statute, a court cannot, in the manner of Sherlock Holmes, pursue the theory of the dog that did not bark.

Harrison v. PPG Indus., Inc., 446 U.S. 578, 592 (1980).

interest of imagined intent . . . ." *United States v. Riggs & Co.*, 203 U.S. 136, 27 S. Ct. 39, 40 (1906) (Holmes, J.).[20]

II. A SECTION 2(b) ATTACK DOES NOT LIE AGAINST TEXAS' DISTRICT COURTS BECAUSE THEY ARE SINGLE MEMBER DISTRICTS

Even if judges were to be "representatives" under the amended section 2(b), Petitioners' dilution claim would still be flawed because district courts are already single member districts. Petitioners characterize this argument as an improper creation of a single officeholder exception out of the whole cloth. This rhetorical ploy is similar to their demand that Respondents prove that Congress intended to exclude judges from the amended section 2. Rather than being a judge-made exception to the statute, it is simply an inherent limitation in the logic of a dilution attack on an at-large position. *See Butts v. City of New York*, 779 F.2d 141, 148 (2d Cir. 1985). Unlike Petitioners, *amicus* the United States acknowledges the truth of this observation. Brief of the United States at 12-15. Judge Entz will not reiterate the United States' argument.

The United States errs, however, in its assessment of how one determines whether an office is a single member office. According to the United States, one simply looks around to see how many of those offices exist in a jurisdiction.

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[20]*See also LULAC*, 914 F.2d at 630 ("[T]his is a case for applying the canon of construction of the wag who said, when the legislative history is doubtful, go to the statute.") (quoting *Greenwood v. United States*, 350 U.S. 366, 374 (1956) (Frankfurter, J.)).

The United States overlooks the very logic that justifies the use of single member districts in a legislative body.

The policy underlying single member districts in a legislative context is to permit each discrete group in the larger community to have a representative who will articulate that group's needs and interests in the process of collective decision making. Through the political process, a collective decision will be reached that properly reflects a balance of all of the interests in the community. That model is simply lacking for Texas' district courts.

The trial proof showed that Texas' district courts are not collegial bodies. *LULAC*, 914 F.2d at 647 (Higginbotham, J., concurring)(referencing Texas Supreme Court Chief Justice Phillips' testimony at trial). Each court operates autonomously from the other courts in handling its docket and performing its judicial functions. Unlike appellate courts, there is no joint deliberation. *See also LULAC*, 914 F.2d at 649 (Higginbotham, J., concurring). The Voting Rights Act "cannot be made to authorize allocating judges by simply restating the office of a district judge as a shared office or by asserting that the 'function' of an office is not relevant. Saying that district judges in fact share a common office that can be subdistricted does not make it so." *Id.*[21]

[21]Petitioners make two contrary arguments. First, they argue that this analysis improperly makes relief to voters depend on the nature of the office. In fact, however, it is the petitioners who chose to make a dilution attack that is inherently limited to multimember offices. Given that inherent limitation, it is plainly necessary to look at the office under attack at least enough to determine whether the limitation is at issue, as it is here.

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III. THIS COURT SHOULD NOT CONSTRUE SECTION 2(b) TO REACH TRIAL JUDGES BECAUSE THAT WOULD REQUIRE THIS COURT TO ADDRESS SERIOUS AND FUNDAMENTAL CONSTITUTIONAL QUESTIONS

If section 2(b) were construed to apply to Texas' district judges, this Court would have to face difficult constitutional questions regarding the validity of section 2(b) so applied. Of course, the existence of these constitutional questions is in itself a reason to construe section 2 not to apply to district court judges. *E.g., Crowell v. Benson*, 285 U.S. 22, 62 (1932). Three serious constitutional questions here argue against construing section 2(b) to apply to Texas' district judges. First, such an application would be an unconstitutional intrusion by the federal government into the intrinsically sovereign aspects of state government. Second, it would unconstitutionally blur the line of separation between judges and the representative arms of government. Finally, if not

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Second, they argue that contrasting multi versus single member offices improperly imports a remedy issue into the liability phase of the case; remedies other than single member offices are possible, such as cumulative voting, they urge. As discussed below, experimental remedies like cumulative voting probably are not permissible judicial remedies. *See infra* note 26. Moreover, this inquiry is not an impermissible injection of remedy in the liability phase, but rather a mandatory inquiry to determine whether the attacked feature -- county-wide election -- is what causes the allegedly dilutive circumstance. *Cf. Thornburg v. Gingles*. Had Petitioners attacked a different feature of the system -- such as a majority vote requirement, had Texas used one -- no such inquiry would be needed. Having chosen to make a dilution attack on the county-wide elections, Petitioners should not now object to the inquiry needed to evaluate that attack.

construed differently or held unconstitutional as applied, this Court would have to consider the general question whether the 1982 amendments to section 2 were constitutional. "A statute must be construed, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional, but also grave doubts upon that score." *United States v. Jin Fuey Moy*, 241 U.S. 394, 36 S. Ct. 658, 659 (1916) (Holmes, J.).

A. Application of Section 2(b) to Texas' State Judiciary Would Unconstitutionally Impinge on Intrinsically Sovereign Matters

1. States Retain a Residual Core of Sovereignty Into Which the Federal Government Cannot Intrude. — For a federal court to dismantle Texas' judicial system would be an unconstitutional intrusion by the federal government into matters of paramount importance to the sovereign state government, in violation of the Tenth Amendment, the Guaranty Clause, and fundamental principles of federalism.[22]

The judiciary is an essential governmental function of the states, and dismantling it "would hamper the state government's ability to fulfill its role in the Union and endanger its separate and independent existence." *United Trans. Union v. Long Island R.R. Co.*, 455 U.S. 678, 687 (1982); *see also Garcia v. San Antonio Metropolitan Transit*

[22]Judge Entz acknowledges that the 14th and 15th Amendments place limitations on the power of states; they did not abolish federalism, however. "Whenever constitutional concerns . . . come in conflict . . . it is and will remain the duty of this Court to reconcile these concerns in the final instance." *Garcia v. San Antonio Metro. Transit Author.*, 469 U.S. 528, 589 (1985) (O'Connor, J., dissenting).

Authority, 469 U.S. 528, 549 (1985) (although overturning *National League of Cities*, the Court recognizes that states occupy a special position in the constitutional system and they do retain a significant amount of sovereign authority); *Coyle v. Smith*, 221 U.S. 559 (1911) (noting restrictions on Congress' ability to prescribe fundamental details of state government such as location of state capitol). As this Court declared in *Texas v. White*, 74 U.S. 700 (1869), "the preservation of the States, and the maintenance of their governments, are as much within the design and care of the Constitution as the preservation of the Union and the maintenance of the National Government." *Id.* at 725. Further, as Justice Black noted in his majority opinion in *Oregon v. Mitchell*, 400 U.S. 112 (1970):

> No function is more essential to the separate and independent existence of the States and their governments than the power to determine within the limits of the Constitution the qualifications of their own voters for state, county, and municipal offices and the nature of their own machinery for filling local public offices.

Id. at 125.

Consequently, the federal government should tread lightly, granting substantial leeway to the states' establishment and maintenance of judicial systems. As discussed below, *see infra* Part III.A.2, implementation of a remedy will involve the federal courts in dictating the finest details of state judicial structure and administration, including jury selection, jurisdiction, venue, and systems of judicial specialization. As Judge Higginbotham stated, "subdistricting would work a

fundamental change in the scheme of self governance chosen by the State of Texas, for it would change the authority behind the decision-making body of Texas Courts — and in doing so it would retard, not advance the goals of the Voting Rights Act." *LULAC*, 914 F.2d at 651 (Higginbotham, J., concurring).

Although states must defer in many respects to the federal government, states still have a residue of sovereignty that the federal government cannot disturb. To force wholesale, untested and perhaps unworkable changes upon a state judicial system based upon the sociologically distorted, mathematical vote dilution proof Petitioners offered, would violate the Tenth Amendment, the Fourteenth Amendment, the Guaranty Clause, and fundamental principles of federalism and separation of powers.[23]

2. Application of Section 2(b) to State Judges Would Impermissibly Intrude on the Operation of the State Judiciary. — The current system of judicial administration in Dallas County supports fundamental state interests. A remedy in this case necessarily must involve either altering fundamental characteristics of that system, such as county-wide venue and

[23]Congress' ability to interfere with the operation of state government under the authority of the Fourteenth or Fifteenth Amendment is even more questionable since section 2 is outside the scope of the amendments' literal protection. The Fourteenth and Fifteenth Amendments protect only against intentional discrimination. *See City of Mobile, supra*. The amended section 2, in contrast, purportedly reaches unintentional action that affects the results in elections. If that is a permissible exercise of congressional power to begin with, *see infra*, it surely is at the nadir of Congress' power, and the power of a statute to displace sovereign state governmental functions must be correspondingly reduced.

jury selection, or attempting to preserve those features while changing elections to smaller than county-wide districts. The District Court's proposed interim remedy followed this latter approach. In either case, the remedy would entail immense intrusion into the finest details of Texas' administration of its judicial system and would be unconstitutional.

Cases filed in Dallas County are randomly assigned to the various judges' dockets. By adopting smaller than county-wide districts while preserving county-wide jurisdiction and venue, the Petitioners would ensure that residents of Dallas County would have cases heard by judges in whose elections they cannot vote. In a "pure" system with thirty-seven single member judicial districts, 36/37 of the voters in Dallas County are thus effectively disenfranchised from voting for any given judge.[24] In such a case, the voters are unconstitutionally disenfranchised, just as the nonproperty owners in *Oregon v. Mitchell*, 400 U.S. 112 (1970), were unconstitutionally prevented from voting in a municipal bond election because of their substantial and direct interest in the matter voted upon. *See also City of Phoenix v. Kolodziejski*, 399 U.S. 204, 213 (1970) (exclusion of nonproperty owners from elections approving obligation bonds violated Equal Protection Clause). In an attempt to advance the voting rights of a minority,

[24]Petitioners suggest that the use of substitute "visiting" judges in some circumstances indicates the policy for voting for judges in Texas is weak. They ignore the fact that visiting judges are used only at the direction of the elected presiding judge, TEX. GOV'T CODE ANN. § 74.056, thus electoral accountability is retained. They also ignore the fact that parties have an absolute right to object to the assignment of a visiting judge in a case. TEX. GOV'T CODE ANN. § 74.053.

Petitioners' solution would unconstitutionally deprive most voters of *their* "judicial" voting rights.

A pure single member district plan also creates difficulties in allocating newly created courts in between the decennial censuses, as illustrated when the district court below imposed its interim single member district plan. The allocational problem in Dallas County was dividing thirty-seven judicial positions among a different number of state legislative districts. At the urging of Petitioners and the Attorney General, the District Court gave the "extra" judicial seats to those legislative districts with the greatest number of minority voters. Thus, judges were allocated in a preferred manner to minority districts. This is surely one of the most flagrant violations of equal protection ever committed in the name of equal rights. The same kind of allocation problem inevitably will occur under any plan to create additional judicial districts between the censuses in response to increased case load.[25]

[25]The interim plan also unconstitutionally allocated courts of the various specializations among the various judicial districts; it permitted the county administrative judge to allocate specialization *after the election*, however he or she sees fit. Thus, some voters were deprived of a civil judge, some of a juvenile judge, and so on. Absent some scheme of four concurrent sets of overlapping single member districts, no single member district plan can avoid this unconstitutional allocation of specialized courts. Moreover, under the specifics of the interim plan, the discretion of the administrative judge to assign specializations apparently was wholly unconstrained, which also surely violates due process and equal protection. *See Hurtado v. California*, 110 U.S. 516, 535-36 (1884). It also was impractical in that a successful civil lawyer judicial candidate with no criminal experience could end up assigned to a criminal bench.

Finally, jury pools in Dallas County are drawn from the entire county. This system complies with an accused's right to trial before a jury from the judicial district in which the offense arose. U.S. CONST. AMEND. VI; *United States v. Dickie*, 775 F.2d 607 (5th Cir. 1985). By creating an interim plan in which the districts were smaller than county-wide, but jury selection remained county-wide, the District Court created a system of jury selection that is constitutionally impermissible for criminal cases. Inevitably, under a system of smaller than county-wide districts, an accused from one Dallas County district will be forced to stand trial before a jury containing persons from four or five different Dallas districts for a crime committed in a completely different district. In such a case, the accused would be denied his constitutional rights. *Id.*

The only alternative to avoiding those problems is to alter the current systems of court specialization, jury selection, venue, and court administration, which presents the constitutional problem of undue intrusion into core features of state government.[26] These established systems have evolved

[26]Petitioners suggest that other alternative remedies, such as cumulative or limited voting would avoid these infirmities. What they neglect is that courts' remedial powers in Voting Rights Act cases do not extend to imposing experimental forms of voting upon a state. *See Wise v. Lipscomb*, 437 U.S. 535, 540-41 (1978) (noting "requirement that federal courts, absent special circumstances, employ single-member districts when they impose remedial plans"); *Martin v. Mabus*, 700 F. Supp. 327, 336-37 (S.D. Miss. 1988) (declining to impose limited voting plan court viewed as "experimental"). Admittedly, it is possible that the State of Texas could invent some entirely different form of judicial selection and administration that would avoid the constitutional pitfalls of a single member remedy; the need for such invention, however, simply heightens the unconstitutional intrusion into core concerns of a sovereign state government that application of the statute to the judiciary would have.

locally through years of experience. The systems work, and are of vital importance to the efficient and orderly administration of justice in Dallas County. Although states' rights are limited by the Civil War amendments and by other powers expressly delegated to the federal government, the states do retain the rights to govern themselves with respect to the basic elements of governance. Recent case law does not explicitly list the states' fundamental rights, but surely the power to establish and maintain an independent judiciary is among them. *See supra* Part III.A.1.[27] Texas has over the years developed an intricate machinery for the administration of justice that fully complies with all constitutional requirements. Simply yanking out a part or two — countywide elections — produces a machine that does not work, i.e., that is not constitutional. The alternative of redesigning the system entirely is not a legitimate task for the federal government or a federal judge.[28]

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[27]The United States suggests that the proper way to account for these competing interests is simply to incorporate those concerns into the "totality of circumstances" that the district court considers in determining liability under section 2. *See* Brief of the United States 17-28. But the United States forgets that the "Senate Factors" include assessing the weight of state policy underlying the challenged practice, and the district court here at least purported to consider that factor. Urging that such concerns should be treated as compelling is not substantially different from urging, as Judge Entz does, that they are so compelling that interference with them rises to the level of a constitutional concern. In either case, the Voting Rights Act is not sufficiently forceful to displace those important state policies.

[28]"It is hard to envision any area lying closer to the core of state concerns than the process by which it selects its own officers and functionaries. Any federal trenching here strikes at federalism's jugular; and such a radical federal trenching as is contended for today should therefore demand a very clear statement indeed." *LULAC*, 914 F.2d at 630-31.

B. Applying Section 2(b) to Judges Violates Principles of Separation of Powers

The Petitioners' suggested application of Section 2(b) to state district judges would abolish substantial distinctions between the executive, legislative and judicial branches. That is contrary to the finely-honed balance of powers (and counter-balancing of the natural human desire for power, if left unchecked) that the federal constitution embodies. *See, e.g.*, THE FEDERALIST No. 9, at 51 (A. Hamilton) (J. Cooke ed. 1961); *id.* No. 47, at 323 (J. Madison); *id.* No. 48, at 335 (J. Madison). Texas had a similar, clear separation of powers ingrained in its organic framework. *See* TEX. CONST. art. II, § 1.

At the core of every state's government is the judiciary. Whether appointed or elected, the judiciary is the arbiter of the citizens' disputes, the forum for victims of crime, and the protector of its citizens' fundamental rights and freedoms. While the legislative and executive branches are in perpetual flux, according to the rough and tumble political whims of the times, the judiciary is the only constant. *See LULAC*, 914 F.2d at 625-26. The legislative and executive branches rightfully may be partial, but as Judge Gee stated, "the judiciary serves no representative function whatever: the judge represents no one." *Id.* at 625. Judge Higginbotham in his concurring opinion in *LULAC* explained that "requiring

subdistricting for purposes of electing district judges, unlike other offices, would change the structure of the government because it would change the nature of the decision-making body and diminish the appearance if not fact of its judicial independence — a core element of a judicial office." *LULAC*, 914 F.2d at 650 (Higginbotham, J., concurring).

The Petitioners not only would redefine judges as "representatives" but would classify particular judges as accountable to the majority sentiment in small, legislative subdistricts from which they were to be elected. Such a result is directly contrary to the foundation of our system of government in which "the legislative, executive and judiciary departments should be separate and distinct, so that no person should exercise the powers of more than one of them at the same time." THE FEDERALIST NO. 48, at 335 (J. Madison)(J. Cooke ed. 1961). Texas incorporates the same concept. *See* TEXAS CONST. art. II, § 1. Congress surely did not mean to strike from Texas' "separation of powers" the key concept so carefully woven in the federal constitution and extended to the states through the Guaranty Clause.[29]

Judge Gee, quoting Professor Eugene Hickok, accurately summarizes Judge Entz's argument:

> The judiciary occupies a unique position in our system of separation of powers, and that is why the job of judge differs in a fundamental way from that of a

[29]"Judicial power" as used in Texas' constitution, *see* Art. V § 1, does not mean to be a representative of the people. That is what the state Senators and Representatives do in making laws. In fact, Article II specifically provides that no person associated with one branch "shall exercise any power properly attached to either of the others."

> legislator or executive. . . . If a member of congress serves to make the law and a president to enforce it, the judge serves to understand it and interpret it. In this process, *it is quite possible for a judge to render a decision which is directly at odds with the majority sentiment of the citizens at any particular time. . . .* Indeed, it can be argued that *the quality most needed in a judge is the ability to withstand the pressures of public opinion in order to ensure the primacy of the rule of law over the fluctuating politics of the hour.*

LULAC, 914 F.2d at 626 (quoting Hickok, *Judicial Selection: The Political Roots of Advice and Consent* in JUDICIAL SELECTION: MERIT, IDEOLOGY AND POLITICS 5 (1990), emphasis added).

C. The 1982 Amendments to Section 2 Were Not A Valid Exercise of Congress' Authority

The Supreme Court has never considered whether the 1982 amendments to Section 2 were a valid exercise of congressional authority. Prof. Lawrence Tribe, never one to be mistaken for a conservative constitutional scholar, notes that there is real doubt on that question. L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 5-14, at 340 (2d ed. 1988). Congress itself seriously questioned the constitutionality of the Section 2 amendments. In fact, the Subcommittee on the Constitution concluded in its report that the proposed amendment was unconstitutional for three reasons. First, Congress cannot outlaw discriminatory results under the Fifteenth Amendment, since the Supreme Court has stated that

only discriminatory intent was prohibited.[30] Second, unlike Section 5, there was no fact finding by Congress that Section 2 was necessary as a nationwide remedial measure. Without such a fact finding, Congress even questioned if Section 2 could qualify as a "remedial" measure.[31] Finally, Section 2

[30]"To the extent . . . that the Supreme Court has construed the Fifteenth Amendment to require some demonstration of purposeful discrimination in order to establish a violation, and to the extent that Section 2 is enacted by Congress under the constitutional authority of the Fifteenth Amendment, the Subcommittee does not believe that Congress is empowered to legislate outside the parameters set by the Court, indeed by the Constitution." 1982 U.S. CODE CONG. & ADMIN. NEWS 177, 342-43 (COMMITTEE ON THE JUDICIARY'S SUBCOMMITTEE ON THE CONSTITUTION, REPORT ON S. 1992 TO AMEND THE VOTING RIGHTS ACT OF 1965, attached as exhibit to Additional Views of Senator Hatch, S. REP. NO. 417, 97th Cong., 2d Sess. 94 (1982)).

[31]"While proponents of the new results test argue that selected Supreme Court decisions exist to justify the expansive exercise of Congressional authority proposed here this subcommittee rejects these arguments. No Court decision approaches the proposition being advocated here that Congress may strike down on a nationwide basis an entire class of laws that are not unconstitutional and that involve so fundamentally the rights of republican self-government guaranteed to each state under Article IV, section 4 of the Constitution.

"It must be emphasized again that what Congress is purporting to do in section 2 is vastly different than what it did in the original Voting Rights Act in 1965. In *South Carolina v. Katzenbach*, the Court recognized extraordinary *remedial* powers in Congress under section 2 of the Fifteenth Amendment. *Katzenbach* did not authorize Congress to revise the nation's election laws as it saw fit. Rather, the Court there made clear that the remedial power being employed by Congress in the original Act was founded upon the actual existence of a substantive constitutional violation requiring some remedy . . . While *Katzenbach* and later *City of Rome* held that the extraordinary powers employed by Congress in section 5 were of a clearly remedial character, and therefore justified the extraordinary procedures established in section 5, there is absolutely no record to suggest that the proposed change in section 2 involves a similar remedial exercise. Because section 2 applies in scope to the entire Nation, there is the necessity of demonstrating that the 'exceptional' circumstances found by the *Katzenbach* court to exist in the covered jurisdictions in fact permeated the entire Nation (although again by

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has an unconstitutional retroactive effect.[32] This Court, like the Subcommittee, should find that Section 2 is unconstitutional for those reasons.

CONCLUSION

For the reasons discussed above, Judge Entz requests that this Court affirm the decision of the Fifth Circuit and render judgment in Judge Entz's favor.

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its very definition the concept of 'exceptionality' would seem to preclude such a finding).

"There has been no such evidence offered during either the House or Senate hearings. Indeed, the subject of voting discrimination outside the covered jurisdictions has been virtually ignored during hearings in each chamber. Indeed as the strongest advocates of the House measure themselves argued, a proposed floor amendment to extend preclearance nationally was 'ill-advised' because no factual record existed to justify this stringent constitutional requirement." *Id.* at 343-44.

[32]"Moreover, a retroactive results test of the sort contemplated in the House amendments to section 2 (the test would apply to existing electoral structures as well as changes in those structures) has never been approved by the Court even with regard to jurisdictions with a pervasive history of constitutional violations. In *South Carolina v. Katzenbach*, the prospective nature of the section 5 process (applicable only to *changes* in voting laws and procedures) was essential to the Court's determination of constitutionality. This was closely related to findings by Congress that governments in certain areas of the country were erecting new barriers to minority participation in the electoral process even faster than they could be dismantled by the courts. Thus, even with regard to covered jurisdictions, the Court has never upheld a legislative enactment that would apply the extraordinary test of section 5 to existing state and local laws and procedures." *Id.* at 344-45.

Respectfully submitted,

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